Supreme Court U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ELUID GONZALES GUERRA,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the ex post facto clause is violated when a criminal offense, which occurred prior to the effective date of the United States Sentencing Guidelines and is sentenced as such along with a separate and distinct criminal offense occurring after the effective date of the Guidelines, is considered as relevant conduct in enhancing the sentence rendered for the Guidelines offense.

II. Whether the Fifth Circuit Court of Appeals in utilizing the "without foundation" standard of review in determining whether a defendant has accepted responsibility under the United

States Guidelines:

a) Is in conflict with other Circuit Courts of Appeals which utilize the "clearly erroneous" standard of review; and

b) Where such a standard review has no historical basis, and thus offends due process.

III. Whether "acceptance of responsibility" under the United States Sentencing Guidelines requires a defendant to accept responsibility for uncharged conduct.

LIST OF PARTIES IN APPELLATE COURT

Eluid Gonzales Guerra,

Appellant,

United States of America,

Appellee

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REFERENCE TO OPINIONS OF LOWER COURT

The opinion of the Fifth Circuit Court of Appeals is reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The panel's order was entered on March 31, 1993. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS AT ISSUE

1. The ex post facto clause contained within Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto law."

2. The Fifth Amendment to the United States Constitution states:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the Southern District of Texas, Houston Division. References herein shall be made to the Pre-Sentence Investigation Report, by the designation "PSR".

On November 9, 1990, the Petitioner was indicted, along with three other co-defendants, by a federal grand jury, charging him with conspiracy to possess with intent to distribute marijuana, distribution of marijuana, use of a communication facility which facilitated the commission of a felony under the Controlled Substances Act, the filing of false tax returns for the years 1985 and 1986; and unlawful entry by a previously

deported alien.

The Petitioner entered a plea of guilty to all charges. The filing of a false tax return and the unlawful entry were the only crimes sentenced under the United States Sentencing Guidelines.

The Pre-Sentence Investigation Report reveals that on February 21, 1986, following the execution of a search warrant, six notebooks were seized from the residence of co-defendants Efraim and Elma Guerra. (PSR:¶ 21). Analysis of the notebooks found them consistent with records used to make narcotics transactions (PSR:¶ 23).

The notebooks seized documented that from early 1984 through 1985 the Petitioner along with others were involved in narcotics trafficking. Customers of the organization corroborated the

transactions found in the notebooks. (PSR:¶ 24).

From 1982 through December 1987, the Petitioner was a self-employed truck driver while being in the marijuana business. The Petitioner allegedly failed to report any gross receipts, as recorded in the narcotic notebooks, as income on his Form 1040 income tax return for the years 1984 through 1987. (PSR:¶ 28). The only income reported by the Petitioner was for his trucking and farming business. Id.

Case investigative material reflected that the amount of marijuana connected with the drug conspiracy was 6,211 pounds and the gross narcotics receipts were in excess of Two Million Dollars. (PSR:¶ 35-36).

The Petitioner received a total of ninety-six (96) months for the three counts that were sentenced under the Sentencing Guidelines.

ARGUMENT

I.

THE USE OF A PRE-GUIDELINE OFFENSE TO ENHANCE THE SENTENCE FOR AN UNRELATED POST-GUIDELINE OFFENSE, BY FINDING THAT DEFENDANT PLAYED AN AGGRAVATING ROLE, VIOLATES THE EX POST FACTO CLAUSE

To find that a defendant plays an aggravating role under the United States Sentencing Guidelines due to a pre-guideline crime, for which a plea of guilty has been entered, amounts to a "backdoor" usage of pre-guideline activity. If criminal activity occurs prior to the effective date of the sentencing guidelines, it is clearly an ex post facto application of the guidelines to count this pre-guideline crime as relevant conduct to subsequent distinct post-guideline criminal activity. In holding that an adjudicated pre-guideline

offense can be considered relevant conduct for criminal activity occurring after the effective date of the sentencing guidelines, the Fifth Circuit rendered a decision in conflict with this Honorable Court's holding in Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351; and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). See U.S. Supreme Court Rule 10.1(c).

Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto law". See Art. I, § 9, cl.3; Art. I, § 10, cl.1. The *ex post facto* prohibition forbids the enactment of any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."

Weaver v. Graham, 450 U.S. at 28. In order for a criminal law to be *ex post facto* law, it must not apply to events occurring before its enactment and it must not disadvantage the offender. Id.

The Fifth Circuit's holding is also in conflict with other Fifth Circuit decisions and other federal circuit courts of appeals, on the issue of whether the guidelines were applied in a manner that violated the Ex Post Facto clause. See U.S. Supreme Court Rule 10.1(a).

This Honorable Court in Weaver expressly stated that the prohibition forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. The critical question being "whether the law changes the legal consequences of acts completed before its effective date." 450

U.S. at 31.

In Miller v. Florida, 482 U.S. 423 (1987), this Honorable Court addressed the ex post facto application of the sentencing guidelines for the State of Florida. Specifically, the Court concentrated on the occurrence of crimes before the effective date of the law.

The central issue in Miller v. Florida was which version of the sentencing guidelines would the defendant be sentenced under, the guidelines in effect at the time the crime was committed or the amended version which was in effect at the time of sentencing. The central concern to the Court was whether the legislature had increased punishment beyond what was prescribed when the crime was consummated. The Court held that using the guidelines in effect at the time

of sentencing made more "onerous the punishment for [the crime] committed before its enactment", and therefore violated the *(ex post facto)* clause. 482 U.S. at 435.

In the case at bar, the Petitioner simultaneously pled guilty to the pre-guidelines offense of conspiracy to possess with intent to distribute marijuana, and the post-guidelines offense of filing a false tax return. The Fifth Circuit upheld the finding that since the Petitioner had a "leadership" role in the marijuana conspiracy, this could be used to enhance his sentence under the guidelines for playing an aggravating role in relation to the crime of filing a false tax return.

The activities of the charged conspiracy ceased to exist before the

initial application of the United States Sentencing Guidelines became effective. Therefore, for that offense the Petitioner was sentenced according to the laws in effect prior to the implications of the sentencing guidelines. However, in calculating a sentence under the guidelines for the offense of filing a false tax return, the court used the conduct involved with the pre-guidelines crime of conspiracy, to increase the sentence of the post-guidelines crime of filing a false tax return. It is apparent that the four (4) level increase, received due to his alleged leadership role in the marijuana conspiracy, amounted to a sentence received under the guidelines for criminal activity that occurred prior to its enactment. This clearly was a retrospective use of the sentencing

guidelines which resulted in a more onerous punishment, and thus violated the *(ex post facto)* clause.

The Circuit Courts of Appeals, including the Fifth Circuit, have recognized that an increased sentence based on an amendment to the guidelines effective after the offense was committed is an obvious violation of the *(ex post facto)* clause in Article I of the United States Constitution. See United States v. Harotunian, 920 F.2d 1040, 1042 (1st Cir. 1990); United States v. Young, 932 F.2d 1035, 1038 n. 3 (2nd Cir. 1991); United States v. Kopp, 951 F.2d 521, 526 (3rd Cir. 1991); United States v. Morrow, 925 F.2d 779, 782-83 (4th Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1021-22 (5th Cir. 1990); United States v. Nagi, 947 F.2d 211, 213 n. 1 (6th Cir. 1991),

cert. denied, --- U.S. ---, 112 S.Ct. 2309, 119 L.Ed.2d 230 (1992); United States v. Swanger, 919 F.2d 94, 95 (8th Cir. 1990) (per curiam); United States v. Sweeten, 933 F.2d 765, 772 (9th Cir. 1991); United States v. Smith, 930 F.2d 1450, 1452 n. 3 (10th Cir.), cert. denied, --- U.S. ---, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991); United States v. Worthy, 915 F.2d 1514, 1516 n. 7 (11th Cir. 1990); and United States v. Lam Kwong-Wah, 924 F.2d 298, 304-05 (D.C. Cir. 1991).

Although the instant case is not analogous with that exact scenario involving amendments to the guidelines, the same logic should apply in the collateral use of pre-guidelines conduct to calculate an offense level for post-guidelines conduct. This simply amounts to an unconstitutional use of the

sentencing guidelines by circumventing the prohibition against *(ex post facto)* laws.

Simply put, the Petitioner received a greater sentence due to criminal conduct occurring prior to the effective date of the sentencing guidelines. A "lawmaker cannot retroactively foreclose even the *possibility* that a criminal defendant would receive a lesser sentence than was potentially available at the time the crime was committed." Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988); citing Lindsey v. Washington, 301 U.S. 397 (1937). As the Court is aware, sentences received under the sentencing guidelines are without the benefit of parole. So the practical effect on the Petitioner was that he received a lengthier sentence without parole due to his plea of guilty to a pre-guideline crime for which he

received a separate sentence.

The panel has rendered an opinion affirming an unconstitutional application of the United States Sentencing Guidelines, which is in conflict with the decisions of this Honorable Court, and other Circuit Courts of Appeals, including the Fifth Circuit. Therefore, a compelling bases exists for this Court to grant the instant Petition for Writ of Certiorari.

II.

THE FIFTH CIRCUIT'S USE OF THE "WITHOUT FOUNDATION" STANDARD OF REVIEW IN REGARDS TO THE "ACCEPTANCE OF RESPONSIBILITY" PROVISION OF THE SENTENCING GUIDELINES IS ERRONEOUS

In reviewing the failure to find "acceptance of responsibility" under Section 3E1.1 of the United States Sentencing Guidelines, the Fifth Circuit held that the district court's findings

are entitled to "greater deference" on review than that conferred under the "clearly erroneous" standard, and thus the district court's conclusion will stand unless the defendant proves the determination was "without foundation". The use of this standard of review by the Fifth Circuit is in conflict with other Federal Circuit Courts of Appeals. See U.S. Supreme Court Rule 10.1(a).

In reviewing a district court's finding under Section 3E1.1 U.S.S.G., the Second, Third, Sixth, Seventh, Ninth and Tenth Circuits have held that determination of "acceptance of responsibility" is a finding of fact that is reviewed under the clearly erroneous standard. See United States v. Restrepo, 936 F.2d 661 (2nd Cir. 1991); United States v. Riviere, 924 F.2d 1289 (3rd Cir.

1991); United States v. Payne, 962 F.2d 1228 (6th Cir. 1992); United States v. Antzoulatos, 962 F.2d 720 (7th Cir. 1992); United States v. Marquardt, 949 F.2d 283 (9th Cir. 1991); and United States v. Ochoa-Fabian, 935 F.2d 1139 (10th Cir. 1991), cert. denied, 112 S.Ct. 1565.

Furthermore, Petitioner would argue that the "without foundation" standard utilized by the Fifth Circuit has no historical basis. Additionally such a standard denies a defendant a fair determination on the issue of whether a defendant has "accepted responsibility". The ultimate effect is, that despite the entry of a plea of guilty to the charged conduct, there appears to exist a presumption that there is no acceptance of responsibility. On the other hand, since the inception of the Federal Sentencing

Guidelines, all circuits have reviewed findings of fact for "clear error". 18 U.S.C. § 3742(e); see also United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991), cert. denied, --- U.S. ---, 112 S.Ct. 1590, 118 L.Ed.2d 307 (1992).

Therefore, this Honorable Court needs to lend guidance to the Circuit Courts of Appeals as to the appropriate standard of review for a finding of "acceptance of responsibility", or the lack thereof under Section 3E1.1 U.S.S.G.. For that reason a compelling basis exists for this Court to grant the instant Petition for Writ of Certiorari.

III.

A REDUCTION IN SENTENCE FOR "ACCEPTANCE OF RESPONSIBILITY" DOES NOT REQUIRE ACKNOWLEDGEMENT OF ALL CRIMINAL CONDUCT, ESPECIALLY IN LIGHT OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Circuit upheld the district court's finding that the Petitioner was not entitled to the appropriate sentence reduction under Section 3E1.1 U.S.S.G., partially because he did not acknowledge his participation in two uncharged murders in Mexico. The panel's decision is in conflict with the decisions of other Circuit Courts of Appeals, which have held that credit for "acceptance of responsibility" does not include uncharged conduct. See U.S. Supreme Court Rule 10.1(c).

The instant indictment charged the Petitioner with committing various federal

crimes within the jurisdiction of the United States. Not only did the alleged murders occur outside the jurisdiction of the United States, but simply no reliable factual basis was established to connect those acts with the instant indictment. In United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989); the First Circuit concluded that "acceptance of personal responsibility for . . . criminal conduct means the criminal conduct to which the defendant pleads guilty." In particular, the Guidelines require acceptance of responsibility for the criminal conduct which formed the basis of the specific counts of the indictment. Furthermore, the First Circuit ruled that by requiring a defendant to make inculpatory statements as to uncharged conduct, in order to receive credit for "acceptance of

responsibility", would penalize the exercise of the Fifth Amendment privilege against self-incrimination. 873 F.2d at 463, citing Lefkowitz v. Cunningham, 431 U.S. 801 (1977). Accordingly, this holding is in conflict with the panel's decision in the instant case.

In United States v. Oliveras, 905 F.2d 623 (2nd Cir. 1990), the Second Circuit held that the district court could not properly deny the defendant credit for acceptance of responsibility on the basis of his denial of prior narcotics transactions. In Oliveras, the district court did not credit the defendant for acceptance of responsibility because he did not acknowledge his participation in criminal activity other than for which he pled guilty.

The First Circuit expressed its concern that requiring the assumption of responsibility for crimes not pled or charged violates the Fifth Amendment privilege against self-incrimination. 905 F.2d at 626. The Court reasoned that as long as the statements are not immunized against use in subsequent criminal prosecution, to accept responsibility for crimes other than those to which he pled guilty would penalize him for refusing to incriminate himself. Id.

Furthermore, the Court in Oliveras cited this Honorable Court in Minnesota v. Murphy, 465 U.S. 420 (1983), for the proposition that the government cannot penalize a person because that person elects to assert their constitutional right not to make incriminating statements. To require a defendant to

accept responsibility for crimes other than those to which he has pled guilty forces defendants to choose between incriminating themselves as to conduct for which they have not been immunized or forfeiting substantial reductions in their sentence.

Likewise, the panel in the instant case has rendered a decision in conflict with United States v. Santiago, 906 F.2d 867 (2nd Cir. 1990). In Santiago, the Second Circuit ruled that the Guidelines do not require a defendant to accept responsibility for crimes other than those to which he had pleaded guilty in order to earn the credit for acceptance of responsibility. The Court noted that to impose such a requirement would violate the Fifth Amendment privilege against self-incrimination. 906 F.2d at 873.

To require the Petitioner to acknowledge his involvement in uncharged and unsubstantiated criminal activity would be a clear violation of his Fifth Amendment right, and effectively make him a witness against himself in the event of a future criminal prosecution. The district court and the panel hearing this case have rendered decisions which are directly in conflict with the decisions of those Circuit Courts cited above.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit Court of Appeals and vacate the sentence and remand for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an original and forty (40) copies of the foregoing Petition for Writ of Certiorari and its Appendix were mailed by the undersigned to the United States Supreme Court on the 28th day of June, 1993. I also certify that true copies of the foregoing Petition of Writ of Certiorari were mailed to the following parties, via United States mail:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2382
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELUID GONZALES GUERRA

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Texas

(CR-H-90-412-1)

(March 31, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA
Circuit Judges.

PER CURIAM: [1]

Defendant, Eluid Gonzales Guerra, appeals his sentence for various offenses involving his marijuana trafficking scheme. Finding no error, we affirm.

I

Law enforcement agents seized two pounds of marijuana and six narcotic notebooks during the execution of a search warrant at the residence of Efrain Gonzales Guerra ("Efrain") and Elma Flores Guerra ("Elma"), the defendant's brother and sister-in-law. The notebooks contained detailed records of the transactions surrounding an illicit

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

marijuana distribution ring. Between 1984 and 1987, this illegitimate business distributed quantities of marijuana valued at over two million dollars.

Guerra pled guilty to the following offenses: filing a false income tax return, in violation of 26 U.S.C. 7206(1) (1988); reentering the United States as a deported alien, in violation of 8 U.S.C. 1326 (1988), conspiring to possess with intent to distribute in excess of 1,000 kilograms of marijuana, in violation of 21 U.S.C. §§ 841 (a)(1), (b)(1)(B), 846 (1988); distributing marijuana in excess of 40 pounds, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (1988); and using a communications facility in facilitating the commission of a felony under the Controlled Substance Act, in violation of 21 U.S.C. § 843(b) (1988).

The district court sentenced Guerra to 384 months of confinement, followed by three years of supervised release. Guerra appeals his sentence, contending the district court erred in: (1) assessing a four-level increase in his base offense level based upon his aggravating role in the underlying drug trafficking conspiracy; (2) refusing to grant a two-level reduction to his base offense level due to his failure to accept responsibility for his criminal conduct; and (3) finding the sum of $2,137,457 directly attributable to his understated gross income. Guerra also claims that he was denied his Sixth Amendment right to effective counsel due to his attorney's failure to file written objections to his presentence report ("PSR") before sentencing.

II

A

Guerra argues that the district court erred in assessing a four-level increase in his base offense level based upon its finding that Guerra was a leader or organizer of the conspiracy to possess with intent to distribute marijuana. See Brief for Guerra at 7. Under the sentencing guidelines, a defendant's base offense level is increased by four levels if the defendant is an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. See United States Sentencing Commission, *Guidelines Manual*, §3B1.1(a) (Nov. 1991). We review the district court's application of the guidelines de novo, and its factual findings for clear error. *United States v. Rodriguez*, 897 F.2d 1324, 1325

(5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 158, 112 L.Ed.2d 124 (1990).

Recognizing that the guidelines apply only to the offenses involving income tax returns and illegal reentry,[2] Guerra first contends that his marijuana trafficking transactions constitute "collateral conduct," and therefore, cannot be considered in assessing his aggravating role.[3] We disagree. The determination of Guerra's base offense level is based upon

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[2] The other offenses occurred before November 1, 1987, and therefore, are not subject to the federal sentencing guidelines.

[3] Guerra does not dispute his status as a leader or organizer of the conspiracy. See Brief for Guerra at 7-10. He was the most culpable participant involved int he conspiracy, and his aggravating role was supported by evidence demonstrating he was a leader of the drug distribution network. See PSR at 13.

all relevant conduct,[4] and "not solely on the basis of elements and acts cited in the count of conviction." U.S.S.G. Ch.3, Pt.b, intro. comment. Moreover, an upward adjustment under §3B1.1(a) is "anchored to the transaction leading to the conviction." *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990). We have previously held that "[i]t is not the contours of the offense charged that defines the outer limits of the transaction; rather it is the contours of the underlying scheme itself. All participants firmly based in the

---

[4] "Relevant conduct" includes: all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense. U.S.S.G. § 1B1.3(a)(1).

underlying transaction is ripe for consideration in adjudging a leadership role under section 3B1.1." *United States v. Mir*, 919 F.2d 940, 943-44 (5th Cir. 1990). thus, the district court, when determining an adjustment under § 3B1.1, may "consider all [relevant] conduct linked to the transaction. . ., even if it falls outside the four corners of the conviction itself." *United States v. Rodriguez*, 925 F.2d 107, 109-10 (5th Cir. 1991). Here, the unreported amounts of income which are the basis for Guerra's income tax offense were "clearly gross receipts from narcotic transactions that were part of the same common scheme and are clearly related." PSR at 11. Consequently, Guerra's role in the marijuana distribution conspiracy is relevant conduct to his income tax offense, and was therefore properly

considered by the district court in determining his sentence.[5]

Guerra further maintains that the government failed to identify at least five participants mandated under §3B1.1(a). See Brief for Guerra at 9. We disagree. Courts may infer the number of participants when applying §3B1.1(a). *Mir*, 919 F.2d at 944. Additionally, the defendant may be counted when determining the total number of participants. *Barbontin*, 907 F.2d at 1498. Using this approach, the government identified more than five

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[5] Similarly, Guerra's contention that he was the only participant in the offenses within the scope of the guidelines is without merit. See *United States v. Manthei*, 913 F.2d 1130, 1136 (5th Cir. 1990) (holding that "participants" under §3B1.1 may include those not charged in the offense).

participants to the underlying conspiracy.[6] Because the district court did not clearly err in finding at least five participants to the conspiracy, and properly considered Guerra's trafficking transactions as relevant conduct, the district court did not err in assessing a four-level increase.

B

Guerra also contends the district court erred in not granting a two-level reduction in his base offense level based upon its finding that he failed to accept responsibility for his criminal conduct.[7]

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[6] The participants identified by the government include Eluid and Nilda Guerra, Efrain and Elma Guerra, Garza-Saenz, his brothers Juan Manuel and Roberto, Maurio Roberto Rameriz-Martinez, and Victor Javier Farias. See PSR at 6, 11.

[7] The guidelines provide for a two-level reduction in the offense level"[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal

"Because of the district court's unique position to assess the defendant's acceptance of responsibility," its findings in this matter are entitled to greater deference on review than that conferred under the clearly erroneous standards. See *United States v. Rodriguez*, 942 F.2d 899, 902-03 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 990, 117 L.Ed.2d 151 (1992); see also U.S.S.G. §3E1.1, comment. (n.5). The district court's conclusion will stand unless the defendant proves the court's determination was "without foundation." *United States v. Buss*, 928 F.2d 150, 152 (5th Cir. 1991).

Guerra's guilty plea does not automatically entitle him to a sentencing reduction for accepting criminal

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conduct." U.S.S.G. § 3B1.1(a).

responsibility. See U.S.S.G. §3E1.1(c). Moreover, before the defendant is entitled to a reduction for acceptance of responsibility he must first accept responsibility for "all of his relevant criminal conduct." *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990). The record shows that Guerra denied involvement in any marijuana conspiracy, denied participating in a double homicide which occurred in Mexico and claimed his income was earned from legitimate sources.[8] Guerra also denied he had a leadership role in the conspiracy. See *United States v. Shipley*, 963 F.2d 56, 59 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 348, 121

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[8] Guerra insisted his income derived from the legitimate sale of farm equipment and tractor trailers, and that he reported this income on his tax returns. See PSR at 14-15.

L.Ed.2d 263 (1992) (holding that "a defendant who is found to have had a leadership role in the offense does not fully accept responsibility for purposes of §3E1.1 if, despite his admission of all elements of the offense of the conviction, he nevertheless attempts to minimize his leadership role"). Furthermore, Guerra was evasive and refused to cooperate with probation officials following the entry of his guilty plea. See PSR at 14; *United States v. Singer*, 970 F.2d 1414, 1420 (5th Cir. 1992) (finding defendant who refused to discuss details of his offense with probation officials not entitled to reduction for acceptance of responsibility). Accordingly, we find no error in the district court's refusal to grant a two-level reduction in Guerra's base offense level.

C

Guerra further contends that the district court erred in finding that he failed to report gross income of $2,137,457. See Brief for Guerra at 14-15. The PSR established ownership of the over $1,031,555 in unreported gross narcotic receipts, $412,113 attributable to Guerra and $619,422 attributable to Efrain and Elma. See PSR at 10. An additional $1,105,902 in gross narcotic receipts was found in the narcotic notebooks. See *id.* at 11. The PSR established that these additional receipts were from "narcotics transactions that were part of the same common scheme and are clearly related" to Guerra's narcotics distribution business. *Id.* The district court calculated Guerra's base offense level by considering the entire $2,137,457

involved in the narcotics conspiracy.[9]

We review the district court's finding of fact for clear error. 18 U.S.C. §3742(e). When "determining the total tax loss attributable to the offense . . . all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates the conduct is clearly unrelated." U.S.S.G. §2T1.3, comment. (n.3) (giving as an example, the "failure to report or an understatement of . . . income from a

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[9] The district court adopted the probation department's conclusions which reported: the defendant understated gross income of $2,137,457. For the purpose of this guideline computation, the tax loss is 28 percent of amount by which the greater of the gross income and taxable income was understated. In this case, 28 percent of the understated gross income is $598,487.96. The corresponding offense level found in the tax table provide in §2T4.1 is 16. PSR at 53.

particular business activity").

Here, the amount of $2,137,457 represents the total income from the particular business activity of drug trafficking. All the income derived from this business is considered part of the same business activity and part of the same scheme or plan. See *id.*; see also *United States v. Kaufman*, 800 F.Supp. 648, 651-52 (N.D.Ind 1992) (interpreting application note 3 of §2T1.1 to require "the court to consider all unreported income, regardless of whose packet into which it went"). Therefore, the district court's finding that Guerra failed to report gross income of $2,137,457 was not clearly erroneous.

D

Lastly, Guerra contends for the first time on appeal that he was denied his

Sixth Amendment right to effective assistance of counsel because his attorney failed to file written objections to the PSR before sentencing. See Brief for Guerra at 16-18. Generally, claims of ineffective assistance of counsel not raised below cannot be resolved on direct appeal. See *United States v. Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), *cert. denied*, 490 U.S. 1097, 109 S.Ct. 2447, 104 L.Ed.2d 102 (1989). However,m because the record here "is sufficiently complete to enable us to fairly evaluate the merits of the claim," *id.*, we resolve Guerra's claim on this appeal. See, e.g., *United States v. Phillips*, 664 F.2d 971, 1040 (5th Cir. 1981) (deciding ineffective assistance of counsel claim on direct appeal where record sufficiently developed on claim), *cert. denied*, 457 U.S.

1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

To establish ineffective assistance of counsel, Guerra must prove that his attorney's performance was both objectively deficient and prejudicial to his defense. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984). Guerra asserts that trial counsel's failure to file written objections to the PSR constituted deficient performance of counsel.[10] We disagree.

Rule 32(a)(1) expressly provides for oral objections to sentencing decisions. See Fed. R. Crim. P. 32(a)(1) (providing "the court shall afford the counsel for

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[10] The record shows that Guerra's attorney made only verbal objections to the PSR. See Record on Appeal, vol. 3, at 3-7.

the defendant. . . an opportunity to *comment* upon the probation officer's determination. . . read and *discuss* the presentence investigation . . . *speak* on behalf of the defendant") (emphasis added). Moreover, we have previously rejected any substantive distinction between written and oral assertions in the courtroom. See *Stokes v. Procunier*, 744 F.2d 475, 482 n.3 (5th Cir. 1984) (refusing to find ineffective assistance of counsel where motion for continuance made orally, rather than in writing). Because Guerra cannot show that his attorney's performance was deficient, his ineffective assistance of counsel claim is without merit. See *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067.

III

For the foregoing reasons, we **AFFIRM.**

Supreme Court, U.S.
FILED
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(3)

No. 93-14

In the Supreme Court of the United States

OCTOBER TERM, 1993

ELUID GONZALES GUERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the enhancement of petitioner's sentence for his aggravating role in the offense, under Sentencing Guidelines § 3B1.1(a), violated the Ex Post Facto Clause.

2. Whether the court of appeals used the correct standard of review in determining whether petitioner was entitled to a reduction in his offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1

3. Whether the district court violated the Fifth Amendment privilege against compelled self-incrimination in denying petitioner a reduction in his offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A3-A22, is unpublished, but the judgment is noted at 990 F.2d 627 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1993. The petition for a writ of certiorari was filed on June 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a plea of guilty in the United States District Court for the Southern District of Texas to filing false income tax returns, in violation of 26 U.S.C. 7206(1) (Counts 10 and 11); re-entering the United States as a deported alien, in violation of 8 U.S.C. 1326 (Count 12); conspiring to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846 (Count 1); distributing marijuana, in violation of 21 U.S.C. 841(a)(1) (Counts 2 and 4); and using a communications facility in the commission of a felony, in violation of 21 U.S.C. 843(b) (Counts 7 and 8). Presentence Report (PSI) 1. He was sentenced to 384 months' imprisonment, to be followed by a three-year period of supervised release. 4/24/92 Tr. 23. The court of appeals affirmed.

1. Between 1984 and 1987, petitioner, his brother Efrain Gonzales Guerra, his sister-in-law Elma Flores Guerra, and other persons operated a marijuana enterprise that distributed more than 1,000 kilograms of marijuana within the Southern District of Texas. Pet. App. A4-A5. The ring's primary supplier was Ernesto Garza-Saenz, a Mexican national and the head of a drug-smuggling family in Mexico. PSI 11-12.

During the execution of a search warrant at the residence of petitioner's brother and sister-in-law, federal agents seized two pounds of marijuana and six narcotics notebooks. The notebooks contained detailed records of the ring's marijuana transactions. The records established that between 1984 and 1987, petitioner and his co-conspirators distributed quantities of marijuana valued at more than $2 million. Of that amount, approximately $1 million was directly attributable to petitioner. On May 5, 1989, petitioner filed his income tax returns for the years 1985 and 1986. On those returns, he did not re-

port any income from his drug transactions. Pet. App. A4-A5; Gov't C.A. Br. 5-6; PSI 3.

2. Because the drug conspiracy and the illegal use of a communications facility occurred before November 1, 1987, petitioner received non-Guidelines sentences for those offenses.[1] He was sentenced under the Sentencing Guidelines on his convictions for filing false income tax returns and for re-entering the United States as a deported alien.

The PSI recommended that petitioner receive a four-level enhancement in his offense level pursuant to Sentencing Guidelines § 3B1.1(a), based on evidence that petitioner was the leader of the marijuana distribution network. PSI 16. The PSI recommended against awarding petitioner a two-level reduction for acceptance of responsibility pursuant to Sentencing Guidelines § 3E1.1, on the ground that petitioner "has not clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct." PSI 17. The PSI explained, PSI 14-15:

> During [petitioner's] interview for this case he did not accept responsibility for his criminal conduct. He was evasive and did not want to provide any information regarding his culpability. He stated that he could not add any details to those already

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[1] In particular, petitioner was sentenced to 180 months' imprisonment on the marijuana conspiracy count, 60 months' imprisonment on the two distribution counts, and 48 months' imprisonment on the two communications facility counts, for a total of 288 months' imprisonment on the pre-Guidelines convictions. 4/24/92 Tr. 22-23. He was sentenced to 72 months' imprisonment on the two tax evasion counts, and to 24 months' imprisonment for the illegal reentry count, for a total of 96 months' imprisonment on the Guidelines convictions. The Guidelines sentences are to run consecutively to the pre-Guidelines sentences, for a total sentence of 384 months' imprisonment.

> contained in the Government's report. He related that any attempt on his part to explain his version of the case would be useless since he had already pled guilty. In his opinion, any attempt to mitigate or clarify his role in the offense would be futile in view of the Government's vast resources already allocated to obtain his conviction. He constantly commented "if you want to know what I did, just look at the report, it's all there." Additionally, he maintained that his income was earned from legitimate sources such as the sale of tractor trailers and some farm equipment which he said he reported on his taxes. He also declared that he was not part of any marijuana conspiracy even though he did admit to his conviction for marijuana distribution in 1974. He adamantly denied being involved in the double homicide as alleged in some of the information found in the investigative material.[2]

Adopting the findings of the PSI, the district court imposed a four-level increase pursuant to Sentencing Guidelines § 3B1.1(a) based on the finding in the PSI that petitioner was a leader or organizer of the marijuana conspiracy. 4/24/92 Tr. 18. The court declined to award petitioner a two-level reduction in offense level for acceptance of responsibility pursuant to Sentencing Guidelines § 3E1.1. The court explained, 4/24/92 Tr. 19:

> The acceptance of responsibility, it's very clear to me from the P.S.I. that [petitioner] simply refused to talk about what he had done, and his references to the

[2] DEA agents interviewed Garza-Saenz while he was imprisoned in Mexico. Garza-Saenz confirmed previous intelligence that petitioner owed him $1.5 million from consigned drug sales. Garza-Saenz also told the agents that petitioner shot and killed Garza-Saenz's brother and a cousin while attempting to resolve the issue of the outstanding debt. Gov't C.A. Br. 6-7; PSI 12-13.

> records simply were his refusal to discuss with the probation officer his activities, which is part of coming up with the two point reduction for acceptance of responsibility. So I have no question in my mind he's not accepting responsibility as that term is used in the Guidelines.
>
> For those reasons I will adopt the Findings of Fact of the presentence report as my own Findings of Fact, and I also adopt the application of those facts to the Guidelines as found in the presentence report.

3. The court of appeals affirmed. Pet. App. A3-A22. It upheld the role-in-the-offense enhancement under Sentencing Guidelines § 3B1.1(a), rejecting petitioner's argument that an increase could not rest on his leadership role in the marijuana trafficking transactions. The court held that petitioner's base offense level was properly based on all relevant conduct, not merely on acts that were cited in the counts of conviction. The court found that petitioner's gross receipts from his drug transactions constituted the unreported income that was the basis for his tax offenses. Based on that determination, the court ruled that petitioner's role in the marijuana conspiracy constituted "relevant conduct" for his income tax offenses under Sentencing Guidelines § 1B1.3, and that the district court therefore properly considered that conduct in determining petitioner's sentence. Pet. App. A7-A10.

The court also rejected petitioner's claim that the district court erred in not granting him a reduction in his offense level pursuant to Sentencing Guidelines § 3E1.1 for acceptance of responsibility. The court noted that the district court's findings on the matter were entitled to greater deference on review than is conferred by the clearly erroneous standard, and that the district court's conclusion would stand unless it was "without founda-

tion." Pet. App. A13. Applying that standard, the court found that the district court had not erred in denying petitioner an acceptance-of-responsibility reduction. The court explained:

> The record shows that [petitioner] denied involvement in any marijuana conspiracy, denied participating in a double homicide which occurred in Mexico and claimed his income was earned from legitimate sources. [Petitioner] also denied he had a leadership role in the conspiracy. Furthermore, [petitioner] was evasive and refused to cooperate with probation officials following the entry of his guilty plea.

Pet. App. A14-A15 (footnote and citations omitted).[3]

ARGUMENT

1. Petitioner claims that the Ex Post Facto Clause prohibited the district court from increasing his offense level for being a leader or organizer of the marijuana conspiracy, under Sentencing Guidelines § 3B1.1(a), since the conspiracy terminated prior to the date the Sentencing Guidelines went into effect. Pet. 7-16. As an initial matter, petitioner did not raise that issue in either the district court or the court of appeals, and thus he may not raise it here for the first time. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[4] Moreover, the

[3] The court of appeals also rejected petitioner's claim that, in setting his offense level, the district court had improperly calculated the amount of gross income he had failed to report, as well as a challenge to the competency of petitioner's counsel. Pet. App. A16-A21.

[4] Furthermore, because petitioner did not lodge an ex post facto objection at sentencing to the district court's consideration of his leadership role in the marijuana conspiracy, he could not obtain relief unless the district court committed "plain error" under Fed.

issue is of diminishing importance, because there are few remaining instances in which the courts will have occasion to consider pre-Guidelines activities as relevant conduct for sentencing purposes, and because there will be even fewer such cases as time passes.

"The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981) (footnote omitted) (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325-326 (1866)). To establish a violation of the Ex Post Facto Clause, this Court has made clear that "the law must be retrospective, that is, it must apply to events occurring before its enactment," and the law "must disadvantage the offender affected by it." *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver*, 450 U.S. at 29). "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" *Miller*, 482 U.S. at 430 (quoting *Weaver*, 450 U.S. at 31).

Petitioner pleaded guilty to a tax offense that he committed after the effective date of the Sentencing Guidelines. Because the actual crime for which petitioner was being sentenced occurred after the effective date of the Sentencing Guidelines, application of Sentencing Guidelines § 3B1.1(a) to that count did not violate the Ex Post Facto Clause.

R. Crim. P. 52(b). Petitioner could not satisfy the rigorous standard of Rule 52(b), however, because he could not show that the district court's ruling was clearly or obviously wrong, or that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

Nor was the Ex Post Facto Clause violated because the district court calculated petitioner's base offense level in part by considering activities that petitioner committed before the effective date of the Sentencing Guidelines. Sentencing Guidelines § 3B1.1(a) provides for a four-level enhancement in the defendant's offense level "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Petitioner's sentence on the tax count was enhanced under that Section based on evidence in the presentence report that petitioner was the leader of an extensive marijuana distribution network through which he netted the approximately $1 million that he failed to report as income. That enhancement was in accordance with Fifth Circuit law at the time petitioner committed the tax offense, which directed that "the section 3B1.1(a) adjustment must be anchored to the transaction leading to the conviction." *United States* v. *Mir*, 919 F.2d 940, 944 (1990). Thus, the "transaction" was not seen as limited to the "minimal elements necessary for conviction," but instead was defined by the "contours of the underlying scheme itself." *Id.* at 945. Accordingly, "[a]ll participation firmly based in that underlying transaction [was] ripe for consideration." *Ibid.* A November 1, 1990, amendment to the introductory commentary to Sentencing Guidelines § 3B1.1 confirmed that interpretation by making clear that "[t]he determination of the defendant's role in the offense is to be made on the basis of all the conduct within the scope of § 1B1.3 (Relevant Conduct), * * * and not solely on the basis of elements and acts cited in the count of conviction."[5]

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[5] The courts of appeals initially were divided over whether the sentencing court could consider only the offense of conviction, see *United States* v. *Pettit*, 903 F.2d 1336, 1340-1341 (10th Cir.), cert.

Thus, under the Sentencing Guidelines, petitioner was punished only for his offense of conviction. His status as a leader of the marijuana conspiracy, which was considered under Sentencing Guidelines § 3B1.1(a) as relevant conduct, was simply one factor bearing on the appropriate punishment for his offense of conviction. See, *e.g.*, *United States* v. *Haddock*, 956 F.2d 1534, 1554 (10th Cir.), cert. denied, 113 S. Ct. 88 (1992); *United States* v. *Ykema*, 887 F.2d 697, 770 (6th Cir. 1989), cert. denied, 493 U.S. 1062 (1990). The practice of considering a defendant's other offenses when sentencing him for the offense of conviction is a longstanding feature of sentencing law, see, *e.g.*, *Williams* v. *New York*, 337 U.S. 241 (1949), and the adoption of that principle under the Sentencing Guidelines simply codifies prior law. As the Sixth Circuit explained in *United States* v. *Ykema*, "[o]mitting all reference in sentencing to information that occurred before the effective date of the guidelines would cripple the use of the guidelines to bring conformity to punishment for like criminal conduct." 887 F.2d at 700.

As applied to petitioner, the enhancement provision of Sentencing Guidelines § 3B1.1(a) serves a function similar to that of an habitual criminal statute. *United States* v. *Regan*, 989 F.2d 44, 48 (1st Cir. 1993); *United States* v.

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denied, 498 U.S. 873 (1990); *United States* v. *Williams*, 891 F.2d 921, 925 (D.C. Cir. 1989), or whether the court also could consider conduct that is part of the same course of conduct or common scheme or plan, see *United States* v. *Fells*, 920 F.2d 1179 (4th Cir. 1990), cert. denied, 111 S. Ct. 2831 (1991); *United States* v. *Mir*, 919 F.2d at 945. Since that amendment was adopted, the courts of appeals have agreed that sentencing courts must use the relevant conduct Guideline, Sentencing Guidelines § 1B1.3, in assessing the defendant's role in the offense under Part B of Chapter 3 of the Guidelines. See, *e.g.*, *United States* v. *Lillard*, 929 F.2d 500 (9th Cir. 1991); *United States* v. *Perdomo*, 927 F.2d 111 (2d Cir. 1991); *United States* v. *Rodriguez*, 925 F.2d 107 (5th Cir. 1991); *United States* v. *Murillo*, 933 F.2d 195, 200 (3d Cir. 1991).

Ykema, 887 F.2d at 700; *United States* v. *Allen*, 886 F.2d at 146. In *Gryger* v. *Burke*, 334 U.S. 728 (1948), this Court held that an habitual criminal statute could be applied to a defendant without violating the Ex Post Facto Clause even though the defendant had committed one of his prior offenses before the recidivist statute became law. This Court explained that "[t]he sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." 334 U.S. at 732. The Court's reasoning in *Gryger* is equally applicable to this case.[6]

2. Petitioner argues that the standard applied by the court of appeals for reviewing the district court's acceptance of responsibility determination is at odds with the "clearly erroneous" standard of review applied by other circuits. Pet. 16-19. The court of appeals held that the district court's determination as to the defendant's entitlement to an acceptance of responsibility reduction will be upheld unless the defendant shows it to be "without foundation." Pet. App. A13. The standard applied by the court in this case is consistent with the Sentencing Guidelines admonition that because "[t]he sentencing judge is in a unique position to evaluate a defendant's ac-

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[6] The circuits that have addressed the question have uniformly held that a sentencing court does not violate the Ex Post Facto Clause by considering offenses committed by a defendant before the Sentencing Guidelines went into effect when calculating a defendant's sentence under the Guidelines. See *United States* v. *Regan*, 989 F.2d at 48; *United States* v. *Haddock*, 956 F.2d at 1553; *United States* v. *Cusack*, 901 F.2d 29, 32 (4th Cir. 1990); *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1124 (11th Cir. 1990); *United States* v. *Sheffer*, 896 F.2d 842, 844-845 (4th Cir.), cert. denied, 498 U.S. 838 (1990); *United States* v. *Ykema*, 887 F.2d at 700; *United States* v. *Allen*, 886 F.2d 143, 145-146 (8th Cir. 1989).

ceptance of responsibility" its determination in this regard is "entitled to great deference on review." Sentencing Guidelines § 3E1.1, Application Note 5. Any difference between the "clearly erroneous" test and the "without foundation" standard applied by the court below is unlikely to result in a difference in outcome in many cases, if it affects any at all. Certainly the outcome of this case would not be affected by a difference in the language used to describe the standard of review, as the district court's ruling on the acceptance-of-responsibility issue was firmly based in the record.

3. Petitioner maintains that the application of Sentencing Guidelines § 3E1.1 in this case violated his Fifth Amendment privilege against compulsory self-incrimination by punishing him for refusing to discuss any circumstances not related to his offenses of conviction. Pet. 20-25. On appeal, petitioner argued that he was entitled to an acceptance-of-responsibility reduction under Section 3E1.1 because he had pleaded guilty to all counts against him. He did not claim, however, that the district court's failure to award him a reduction violated his Fifth Amendment self-incrimination privilege. Thus, he cannot raise that claim now. *United States* v. *Lovasco*, 431 U.S. at 788 n.7. In any event, petitioner's claim does not warrant further review.

Petitioner is correct that at one time there was some disagreement among the courts of appeals with respect to whether Sentencing Guidelines § 3E1.1, in requiring a defendant to accept responsibility for conduct other than what underlies the offense of conviction, implicates the Fifth Amendment. Compare, *e.g.*, *United States* v. *Mourning*, 914 F.2d 699 (5th Cir. 1990), with *United States* v. *Oliveras*, 905 F.2d 623, 626-628 (2d Cir. 1990), and *United States* v. *Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989). The Sentencing Commission, however, has now resolved that disagreement. An amendment to the

Sentencing Guidelines that became effective on November 1, 1992, changes the language in Sentencing Guidelines § 3E1.1 to require a defendant to accept responsibility for "his offense." Application Note 1(a) to Section 3E1.1 also indicates that that Guideline requires a showing of contrition only with respect to the offense of conviction. The disagreement cited by petitioner thus is only a matter of historical interest; it is of no continuing practical importance.

Nor did it implicate the Fifth Amendment for the district court to deny petitioner an acceptance-of-responsibility reduction for refusing to answer questions about conduct unrelated to the specific offenses to which he pleaded guilty. Other conduct on petitioner's part amply supports the district court's conclusion that petitioner did not show genuine remorse for his crime, and that he was accordingly not entitled to an acceptance-of-responsibility reduction in his offense level.

Petitioner was evasive and refused to cooperate with probation officials after entry of his guilty plea, declining to provide any information regarding his culpability. He stated that he could not add any details to those already found in the government's report, claiming that any attempt on his part to explain his version of the case would be useless since he had already pleaded guilty. What is more, he maintained that his income was earned from legitimate sources, such as the sale of tractor trailers and farm equipment, which he said he reported on his taxes. Pet. App. A14-A15; PSI 14. Petitioner's refusal to answer questions that were directly related to his offenses of conviction justified the district court in finding that petitioner had failed to carry his burden of demonstrating an affirmative acceptance of responsibility.

For that reason, the district court's refusal to reduce petitioner's offense level under Section 3E1.1 rested on

several factors apart from petitioner's refusal to discuss his participation in the marijuana conspiracy and the double homicide. A sentencing court's reliance on conduct that is inconsistent with the acceptance of responsibility has been uniformly upheld. See, *e.g.*, *United States* v. *Olvera*, 954 F.2d 788, 793 (2d Cir.), cert. denied, 112 S. Ct. 3011 (1992); *United States* v. *Reed*, 951 F.2d 97, 99-100 (6th Cir. 1991), cert. denied, 112 S. Ct. 1700 (1992); *United States* v. *O'Neil*, 936 F.2d 599, 600-601 (1st Cir. 1991); *United States* v. *Villarino*, 930 F.2d 1527, 1529-1530 (11th Cir. 1991); *United States* v. *Hibbert*, 929 F.2d 434, 435 (8th Cir. 1991); *United States* v. *Cooper*, 912 F.2d 344, 346-348 (9th Cir. 1990); *United States* v. *Franklin*, 902 F.2d 501, 506 (7th Cir.), cert. denied, 498 U.S. 906 (1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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